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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

RENATO RIVA,

Petitioner,

-against-

JOHN N. MITCHELL, WILLIAM B. TAFFETT, DOMINICK F. RINALDI, and WILLIAM B. ROGERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Third Circuit, entered in the above cause on May 16, 1972, and the Order of said Court denying the petition for rehearing, entered November 3, 1972. The opinion of the Court of Appeals was reported in 460 F.2d 1121 (1972).

OPINION BELOW

FIRST: The judgment of the United States Court of Appeals for the Third Circuit is contained in the Appendix, as is the Order of said Court denying rehearing. An extract from the Oral

Opinion of Hon. Leonard I. Garth, United States District Court, District of New Jersey, the Docket Entry of Judgment of said Court, the Decision of the Board of Immigration Appeals, and the Decision of the Special Inquiry Officer are also contained in the Appendix.

SECOND: The order sought to be reviewed was entered on January 7, 1969, by a Special Inquiry Officer of the Immigration & Naturalization Service, and was affirmed by the Board of Immigration Appeals on May 16, 1969. On March 17, 1971, the United States District Court for the District of New Jersey affirmed the decision of the Board of Immigration Appeals and refused to grant declaratory relief.

This decision was affirmed by the Court of Appeals on May 16, 1972; Order denying petition for rehearing was entered on November 3, 1972. Jurisdiction to review the matter sought herein is conferred upon this Court by 28 U.S.C. 1254(1).

THIRD: Questions presented for review are as follows:

1. Whether an alien who was admitted to the United States for permanent residence who went abroad to the American Embassy in Lima, Peru, and relinquished his permanent residence, then acquired a nonimmigrant student visa, and acquired thereby a draft exempt status, is inadmissable upon his return to the United States as a person who has "departed from or remained outside the United States to avoid or evade training or service in the Armed Forces . . ." within the meaning and intent of Section 212(a)(22) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(22).

2. Whether the disparity of treatment afforded petitioner by

the Statute, and the Immigration and Naturalization Service as compared to other aliens in similar situations constitutes a denial of equal protection of the laws.

FOURTH: The statutory sections which the case involves are as follows: Immigration & Nationality Act, 66 Stat. 163(1952), as amended: 8 U.S.C. 1101(a)(15(A), (E), (G), (I), (J), 8 U.S.C. 1257; 8 U.S.C. 1258; 8 U.S.C. 1182(a)(22); 8 U.S.C. 1481(a)(10).

STATEMENT OF THE CASE

FIFTH: The Petitioner first entered the United States in 1965 with the intention of remaining temporarily and returning to Peru where he was employed in his father's business. Petitioner married in the United States in 1965, but because his wife, a native United States citizen and a school teacher in Toms River, New Jersey, was unable to leave the United States with him at that time, they decided to delay the move to Peru until June, 1966. Finding that he could not work as a nonimmigrant worker, on November 28, 1965, petitioner changed his immigration status and became a permanent resident of the United States. Thereafter, he worked and went to school. In December 1965, he registered for the draft, and in February 1966, he was classified 1-A. At such time, Petitioner intended to remain in the United States for less than two years, and he was committed to return to his father's business. Accordingly, he sought the advice of the Selective Service System, and the Immigration & Naturalization Service on how he might best place himself in a draft exempt status. In response to his inquiries, Petitioner was advised by representatives of the Federal Government that he would be subject to the draft so long as he held his immigrant visa, but that if he changed his

status to nonimmigrant, he would be in an exempt category. Petitioner was also advised that his status could not be changed to nonimmigrant while he was physically present in the United States, and that it would be necessary to first proceed abroad to effect his change in status.

With the intention of complying with the technical prerequisites for change in status imposed by the law, Petitioner departed for Lima, Peru on August 7, 1966, where he was advised by an official of the American Consular Office that he could relinquish his permanent residence and acquire a draft exempt status. Accordingly, he relinquished his permanent residence at that time by returning his Alien Registration Receipt Card to the Immigration & Naturalization Service, together with a letter explaining that he intended to reside only temporarily in the United States. Immediately thereafter, on August 30, 1966, Petitioner returned to the United States as a visitor and continued living with his wife and attending school. At such time, he was under age 26, and was squarely within the jurisdiction of his local draft board.

Because further extension of his stay was denied, Petitioner departed from the United States on February 11, 1967, and made application for an I-type visa as representative of a foreign information media. He returned to the United States on February 18, 1967. Petitioner was subsequently placed under deportation proceedings for remaining in the United States too long, and was granted voluntary departure. During this period, serious changes in his father's business caused him to reassess his situation and he decided to live in the United States permanently, and he, therefore, applied for an immigrant visa. Time for voluntary departure was extended by the Immigration & Naturalization Service to allow him to complete visa

processing by mail with the American Embassy in Lima, Peru.

Petitioner departed from the United States for Peru on May 25, 1968, but was not issued an immigrant visa. The Consul did, however, issue him a student visa to permit him to return to school and take his final examination. On his arrival in May 1968, when he attempted to enter this country with his student visa, Petitioner was referred to a Special Inquiry Officer for a hearing in exclusion proceedings.

On January 27, 1968, a Special Inquiry Officer found Petitioner inadmissable under Section 212(a)(22) of the Immigration & Nationality Act which bars the admission of

> "persons who have departed from or have remained outside the United States to avoid or evade training or service in the Armed Forces in time of war or in a period declared by the President to be a national emergency . . ."

The decision of the Special Inquiry Officer was affirmed by the Board of Immigration Appeals. The United States District Court for the District of New Jersey affirmed the decision of the Board and refused to grant declaratory relief. The decision was affirmed by the Court of Appeals on May 16, 1972.

BASIS FOR FEDERAL JURISDICTION

SIXTH: The federal statute which formed the basis for the exclusion proceeding was 8 U.S.C. 1182(a)(22) of the Immigration and Nationality Act, 66 Stat. 163 (1952), as amended, 8 U.S.C. 1101, et seq. Jurisdiction in the District Court was founded in 28 U.S.C. 2201, and 5 U.S.C. 702-704, and 8 U.S.C. 1329, and jurisdiction in the Court of Appeals in 28 U.S.C. 1291.

REASONS FOR ALLOWING THE WRIT

SEVENTH: *A. The issues presented by the instant petition are of great significance and should be determined by the Court.*

Initially, Petitioner submits that the issues involved herein are of tremendous personal significance to him and his family. Enforcement of the order of the Court would require his departure and permanent exclusion from the United States. This would require that his wife, a native born United States citizen, elect whether to remain in the United States, the only country she has ever known, and be separated from her husband, or to go abroad with her husband and live in Peru. The penalty which would thus be incurred by petitioner would be vastly disproportionate to the act in which he engaged.

Additionally, the adjudication of this case has far reaching ramifications at a time when the United States is disengaging from the Viet Nam conflict. Petitioner suggests that his situation is distinguishable from that of others who left the country to evade the draft and who are now seeking to return as the cessation of hostilities approaches. Adjudication of this case by this Honorable Court would serve to delineate the boundaries of permissible departure from the United States with Selective Service consequences, and the effect of such departure upon subsequent readmissibility to this country.

Petitioner also notes that both the Board of Immigration Appeals and the United States Court of Appeals for the Third Circuit recognized the significance of this case by writing a lengthy opinion. In fact, it stands at present, as one of the leading precedents in the interpretation of 8 U.S.C. 1182(a)(22).

B. The determination that the Petitioner is inadmissible to the United States under Section 212(a)(22), 8 U.S.C. 1182(a)(22) is erroneous as a matter of law.

The legislative history of Section 212(a)(22) of the Immigration & Nationality Act reveals without question that such provision was enacted by Congress to penalize those who flee the jurisdiction of the United States during time of war or national emergency, with the intention of returning to the United States at the end of the period of war or national emergency. The *sine qua non* of the provision is clearly the deliberate placing of oneself beyond the jurisdiction of the United States to evade or avoid military service, and the attempt to attain thereby a *temporary* haven.

Petitioner submits that the conduct in which he engages lies far beyond the scope of Section 212(a)(22) *supra,* and that it would be grossly unfair and erroneous to subject him to the sanctions of that provision. The opinion of the Court of Appeals, as well as the opinions of the District Court, the Board of Immigration Appeals, and the Special Inquiry Officer, placed undue and unwarranted significance upon Petitioner's brief departure from the United States in August, 1966, which was merely *incidental* to *bone fide* and legal change of his immigration and draft status. The record shows, without contradiction, that the *only* reason Petitioner left the United States at that time was because he had been informed that such departure was necessary under the immigration laws to effectuate change of status from that of permanent resident to that of nonimmigrant. In fact, if Petitioner had fallen within the provisions of Section 247 of the Act (8 U.S.C. 1257) which permits a permanent resident alien to change to various categories of nonimmigrant status in the United States, he would

not have had to make the journey at all. Petitioner temporarily absented himself from this country, effectuated the necessary modification of his immigration status, which technically could only be accomplished from abroad, and immediately returned to the United States and placed himself squarely within the jurisdiction of the Courts, and his local draft board. Such temporary absence, in no way, resembles the grossly evasive and arguably illegal conduct contemplated by Congress in drafting Section 212(a)(22), *supra.* Petitioner also notes that his change of status to that of non-resident in 1966 was totally in accord with his state of mind during that period, in that he did not then intend to remain permanently in the United States but intended to return instead to his father's business in Peru. Such state of mind, which is not seriously disputed, establishes both the honesty with which Petitioner acted, and further distinguishes his situation from that contemplated by Congress, i.e., temporary flight with intent to reestablish permanent residence at a later and safer time.

In short, Petitioner's temporary absence from the United States was merely *incidental* to a legal and valid change in his draft status. It is no more subject to the penalties of Section 212(a)(22) than would be the conduct of a student deferred from military service whose school required that he study abroad for a short period, or the conduct of an employee holding an occupational deferment whose employer required him to work briefly abroad to keep his job. All of these situations involve departure from the United States which is both temporary, and incidental to the purpose of obtaining draft deferred status, and none should be held to be within the scope of the draconian sanctions of Section 212(a)(22).

In its opinion herein, the Court of Appeals relies upon two

cases, *Jolly v. Immigration & Naturalization Service*, 441 F.2d 1245 (5th Cir. 1971), and *Ramanskas v. Flagg*, 309 F.2d 290 (7th Cir. 1962) in support of its assertion that appellant's contentions have been rejected previously. It is submitted, however, that both of these cases dealt with situations entirely different from the case at bar. In *Jolly*, the individual went to Canada while deferred as a student, requested a conscientious objector status, and when he was subsequently reclassified 1-A, renounced his United States citizenship. He returned to the United States over *one year* after the time of his departure. It was emphasized in the Court s opinion that he renounced his citizenship to avoid military service, stating that he was compelled to abandon his country because of his abhorrence to the Selective Service laws.

In *Ramanskas, supra,* the alien involved entered the United States in 1949 as a permanent resident, and was ordered to report for induction in 1952. He departed from the country soon thereafter and remained in Argentina until 1954.

Both cases differ substantially from the present case in that the alien remained outside the jurisdiction of the United States for the purpose of avoiding the draft. In the present case, Petitioner merely left the country for a matter of *days* in order to comply with a technical requirement of the law, and immediately returned to the jurisdiction of the United States.

C. The determination that the Petitioner is inadmissible to the United States constitutes a denial of equal protection of the laws.

Petitioner submits that a denial of equal protection of the laws results from an invidious distinction between categories

within the statute, and an invidious and unreasonable distinction between classes of persons in the application of the law by the Immigration & Naturalization Service.

Within the framework of the law itself, there are certain circumstances in which a lawful permanent resident alien can acquire nonimmigrant status without physically departing from the United States. Section 247 (8 U.S.C. 1257) provides that a permanent resident alien can change from a permanent resident to an A-type, E-type or G-type nonimmigrant status (8 U.S.C. 101(a)(15)(A)(E)(G)), without leaving the United States. If a person obtains nonimmigrant status pursuant to any of the above cited statutory provisions for the purpose of acquiring military exempt status under the Selective Service Act, there is no question that Section 212(a)(22), *supra,* would be inapplicable. Furthermore, such person would then be entitled to change his status to any other nonimmigrant classification pursuant to Section 248, 8 U.S.C. 1258. However, because Petitioner changed his status from permanent resident to nonimmigrant in a manner which required his *incidental* and *temporary* departure from the United States, the Government would have him suffer the full brunt of the sanctions imposed by Section 212(a)(22).

Addtionally, Petitioner maintains that there is inequity and lack of equal protection of the laws in the administration of the statute. The Petitioner did no more by leaving the United States to acquire legal draft immunity than other aliens have done with the approval of both the Immigration & Naturalization Service and the Selective Service Board. The Board of Immigration Appeals, in its opinion, took judicial notice of the fact that these agencies permitted certain doctors, who were admitted to the United States as immigrants, to depart and

apply at an American Consulate for an exchange visitor visa provided for in Section 101(a)(15)(J), 8 U.S.C. 101(a)(15)(J). As exchange visitors, these aliens are no longer subject to the draft. Appellant submits that there is no rational basis for distinguishing his situation from that of the doctors to whom such preferential treatment was extended.

CONCLUSION

EIGHTH: On the basis of all of the above, Petitioner urges that the decision below ought not to be permitted to stand, for it is contrary to the clear intent of Congress, contrary to equal protection of the laws, and imposes an overly harsh and unwarranted burden upon Petitioner and his family.

Respectfully submitted,

ELMER FRIED
Attorney for Petitioner

MARTIN L. ROTHSTEIN
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1530

RENATO RIVA, *Appellant*

v.

JOHN N. MITCHELL, WILLIAM B. TAFFETT, and DOMINICK F. RINALDI, and WILLIAM B. ROGERS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued April 21, 1972

Before ADAMS, ROSENN and HUNTER, *Circuit Judges*

OPINION OF THE COURT

(Filed May 16, 1972)

ROSENN, *Circuit Judge.*

Appellant was declared inadmissible to the United States under 8 U.S.C.A. §1182(a) (22) by a Special Inquiry Officer. The Board of Immigration Appeals upheld this decision. Appellant then proceeded to file a petition with the District Court for the District of New Jersey seeking a declaratory judgment to have the construction given 8 U.S.C.A. §1182(a) (22) by the Inquiry Officer overturned. The district court by summary judgment upheld the findings of fact and conclusions of law of the Special Inquiry Officer and the Board of Immigration Appeals. This appeal followed. We affirm.

The appellant entered the United States in August 1965 as a non-immigrant visitor in order to marry and

return to Peru with his wife. He was married on August 8, 1965 to a native born United States citizen. Because his wife was unable to leave the United States at the time, they decided to delay the move to Peru until June 1966. Finding he could not work as a non-immigrant visitor, he asked for and obtained on November 29, 1965, the status of permanent resident allegedly at the request of his employer. He then worked and also went to school.

Since appellant had obtained permanent resident status, it was necessary for him to register with his local draft board. In February of 1966, his draft board classified him I-A, and ordered him to report for a physical examination on March 14, 1966. He, thereupon, unsuccessfully sought to have his immigration status changed to that of a draft-exempt non-immigrant on the ground that he did not intend to remain in the United States more than two years because he was committed to return to his father's business. Notified to report for induction on August 19, 1966, appellant informed the draft board that he had no intention of remaining in the United States and that he desired to be relieved from army induction by changing his immigration status. He was again unsuccessful.

Appellant determined that he would return to Peru, relinquish his status as a permanent resident, and return in a non-immigrant status which would enable him to gain draft exemption. He left the United States on August 7, 1966, and the following day consulted with the American Vice Consul in Lima, Peru. He then wrote a letter to the United States Immigration authorities advising them that he was surrendering his immigration status, that he had never intended becoming a citizen, and that he had intended residing only temporarily in the United States. He also returned his Alien Registration Receipt Card with this letter. On August 30, 1966, he returned to the United States as a non-immigrant visitor by presenting the tourist visa with which he had entered in 1965. He continued living with his wife at his old address and went back to school.

Thereafter, he applied for an extension of stay as a visitor. This application was denied in January of 1967. He left the United States during that month, and then returned as a representative of a foreign information media. However, he was primarily occupied in completing his college studies. At this time, appellant was attempting to obtain an immigrant visa through the offices of the American Consul in Lima, Peru because he had decided to live permanently in the United States. In May of 1968 while currently under deportation proceedings, appellant left for Peru.

During an interview with the American Consul in Peru, appellant, allegedly for the first time, became aware that there was a legal issue concerning his eligibility for an immigrant visa. Appellant desired, however, to return quickly to the United States in order to take his school's final examinations. He obtained from the Consul a student visa and with this sought to return to the United States. During his entry to the United States, the primary Immigrant Inspector in Miami, Florida was uncertain as to the proper status of appellant. He was admitted to the United States, but his case was brought to the attention of a Special Inquiry Officer.

That officer, after a hearing, concluded that appellant was inadmissible to the United States ". . . as an alien who departed from the United States to evade military service in the armed forces of the United States. . . ." However, the officer permitted appellant to remain in the United States until February 15, 1969, in order to complete his examinations and obtain his degree.

The decision of the district court, and indeed, the decision of the Special Inquiry Officer and the Board of Immigration Appeals, essentially turned not upon any disputed facts, but upon the terms of the statute. 8 U.S.C.A. §1182(a) (22) provides that among the classes of aliens who shall be excluded from the United States are:

> . . . persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency. . . .[1]

Appellant has not attacked the finding that he left the United States in order to obtain an immigration classification that would allow him to avoid service in the armed forces. Indeed, it would appear impossible for him to do so. Rather, his principal argument is that the statute was not meant to apply to persons in his position. Appellant argues that his position is different from those to whom the statute is directed because: (1) the law addressed itself to draft dodgers who fled the United States with the purpose of returning at the cessation of hostilities. He contends that "[t]here is no indication that Congress intended to impose penalties upon someone whose physical departure was brief and for the sole purpose of acquiring non-immigrant status upon his prompt return to the United States;" (2) his departure was not to avoid or evade military service but solely to acquire a non-

---

1. The pertinent text of the statute reads as follows:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> . . .
>
> (22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; *or persons who have departed from* or who have remained outside *the United States to avoid or evade training or service in the armed forces* in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrants. . . . (Emphasis supplied.)

On December 16, 1950, President Truman issued Presidential Proclamation Number 2914, 3 CFR 99 (1949-1953 Comp.) declaring that a state of national emergency existed. Neither Congress nor subsequent Presidents have revoked this proclamation.

immigrant status which he would not acquire without a physical departure.

Appellant's argument, as sophisticated as the stratagem by which he secured draft exemption, is specious. Although his departure enabled him to legally secure a draft exempt status, it was made in the face of 8 U.S.C.A. §1182(a) (22) which declared aliens inadmissible who have departed the United States to *avoid* or *evade* training or service in the armed forces in time of war or national emergency. Because the departure was brief and his return to the jurisdiction of the draft board in draft exempt status was immediate does not insulate the departure from the exclusionary provisions of the statute. "It is equally clear that the classification made by the draft board upon appellant's return . . . is without bearing upon his status at the time of his departure or upon the legal effect of that departure upon his deportability." *Alarcon-Baylon v. Brownell*, 250 F.2d 45, 47 (5th Cir. 1957). The obvious purpose at the time of departure was to acquire non-immigrant and draft exempt status, according to the findings of the Special Inquiry Officer, and thereby avoid military service. Military service was avoided by securing non-immigrant status. The findings are supported by substantial evidence.

The case law construing §1182(a) (22) is not voluminous. But, both of appellant's contentions have been rejected *sub silencio* in other circuits. *Jolly v. Immigration and Naturalization Service*, 441 F.2d 1245 (5th Cir.), *cert. denied*, 404 U.S. 946 (1971); *Ramasauskas v. Flagg*, 309 F.2d 290 (7th Cir. 1962).

It would be strange indeed, if appellant were able to succeed here, on what is essentially the argument that he did no more than he was legally entitled to, when under 8 U.S.C.A. §1426 aliens who have *lawfully* obtained relief from military service are ineligible for citizenship.[2]

2. 8 U.S.C.A. §1426 reads in part:

> . . . any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces . . . on the ground that he is an alien . . . shall be permanently ineligible to become a citizen of the United States.

Ambra v. Ahrens, 325 F.2d 468 (5th Cir. 1963). And, of course, aliens who are ineligible for citizenship are excluded under the statute from admission as permanent residents. *Paris v. Shaughnessy*, 247 F.2d 1 (2d Cir. 1957). When §1426 is read in conjunction with §1182, it is clear that the intention of Congress was to see that once an alien faced induction into the armed services, he would have to choose between either maintaining *permanently* his status *as an alien* or serving in the armed forces and securing the right to become a citizen and permanent resident.

Appellant's second contention—that he returned to the United States and placed himself physically within the jurisdiction of his draft board—is likewise without merit. He had now immunized himself from military service by securing a draft exempt status. Even when an alien returns to the United States and serves in the armed forces, he may still be excludable under §1182(a) (22) if he left the country to avoid military service. *Ramasauskas v. Flagg*, supra.

Appellant has made reference to the legislative history of §1182(a) (22). His argument, however, does not contradict the conclusion to which we come. Generally, appellant's use of legislative history shows only that Congress had principally in mind those who, in order to evade the draft, placed themselves without the United States over an extended period of time. At most, this means only that appellant was not in a class against whom the Act was primarily directed. It does *not* mean that Congress did not intend the Act to apply to those in appellant's situation. Moreover, ". . . if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators." *Barr v. United States*, 324 U.S. 83, 90 (1945).

Appellant argues that he has done no more than is permitted by the Immigration and Naturalization Service and the Selective Service System when they allow certain

doctors, admitted to the United States as immigrants, to depart and apply at an American Consulate for an exchange visitor visa. Later, he suggests, they may regain their immigrant status. Assuming that this be true (and appellant has cited no sources to establish the fact), it has no relevance to this proceeding and, its impropriety, if any, should be the subject of an independent inquiry.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

ORDER DENYING THE MOTION FOR REHEARING

[Same Title]

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN and HUNTER, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Max Rosenn
Circuit Judge

Dated: November 3, 1972

EXTRACT FROM ORAL OPINION OF HON. LEONARD I. GARTH, U.I.D.C.J.

[Same Title]
Feb. 22, 1971
Before: Hon. Leonard I. Garth, U.S.D.C.J.

***

THE COURT: Mr. Hollyer, Mr. Fragomen, I'm referring to Hamas, H-a-m-a-s, 309 F 2nd, 290 in 1962. It's a Seventh Circuit Case. The petitioner who was in the United States had been notified on March 23rd, 1961 to report on April 10th, 1961 for deportation to Argentina. On April 5th, five days before the scheduled deportation, he filed present action for judicial review, and the nature of the petitioner re a writ of habeas corpus – mind you, he wasn't detained, he was in the United States, and the particular statutory provision being invoked was Section 212A-22, not the excludable provision.

MR. HOLLYER: Deportation.

THE COURT: I don't know. The same one with which we are confronted here, so in effect, he used a habeas corpus review procedure although he had not been detained. Now, whether this issue was brought up or not, I can't tell you, but it does seem to me that in light of the order that was ultimately entered by the Special Inquiry Officer in which he, only the petitioner, only sought to come into the United States for the limited purpose of attending school, and I don't know how the Special Inquiry Officer could have been more specific or more precise in designating that this individual in his view was excludable but he was permitting him in for a very narrow and

restrictive purpose, it almost seems to me that was the final order of excludability, but that final order of excludability became effective or implemented on February 15, 1969 was like a condition subsequent also, and its admitting you subject to the condition only that February 15th, 1969 you are excluded, and I don't know that anything should be – this was done for the petitioner's relief as well, and it was fortified, of course, by the discretion of the Special Review Officer, so that I think at least that the elements of a habeas corpus position were present here and could be utilized should the proceeding fail at this point of it. I would think not, because I have reviewed the papers that have been submitted and I don't think that on that narrow ground the issues should be developed before this Court.

There was a second issue raised here as to whether or not the consular officer in Lima, Peru should have review of his decision, and this might become a great deal more pertinent if in fact there has been a diversity between his view and that of the Special Inquiry Officer. Whether I affirm the actions taken by the Special Inquiry Officer and the Board of Appeals as finding no legal error in this procedure and both counsel have stipulated the scope of review has to do with the substantial evidence, and both counsel have stipulated that there are no material facts in issue and that I may as I understand it utilize the materials that are set forth in the decision of the Special Inquiry Officer as to the findings of fact and conclusions of law without going beyond them because there are no other disputed factors that could be raised, in the ordinary course, I would have asked more, and the transcript will indicate I would have asked for actual transcripts and exhibits, but in light of that stipulation, I am constrained to adopt what has been stated by the Special Inquiry Officer and the Board of Appeals and just apply to the facts as found the pertinent sections of the statute,

and I find there is no error in the interpretation that was given, so I find no great significance whether or not one considers a review of the consular office visa or not, but I am resting my decision in denying the plaintiff his relief and granting the government its relief on the fact that on the merits themselves I am constrained to come into the same view as the Special Inquiry Officer, the Board of Appeals, and it should be noted parenthetically also that the consular officer who in the first instance that this gentleman was excludable by reason of the statute and of his activities in having left the country.

I think that disposes of all the issues if I'm not mistaken. Have I left anything open?

(No response.)

THE COURT: That being the case, there will be a denial of your motion for summary judgment and granting the government's motion for summary judgment and you will submit the appropriate order.

***

I, Samuel Toplansky, do hereby depose and state that the foregoing is true and accurate transcript of the proceedings as taken stenographically by me at the time, place and on the date hereinbefore set forth.

s/ Samuel Toplansky
Samuel Toplansky
Shorthand Reporter

My Commission Expires
June 14, 1975

DOCKET ENTRY OF JUDGMENT

CLERK'S OFFICE
UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW JERSEY
Newark

[Same Title]

Civil Action No. 291-70

There was entered on the docket on 3-17-71 (judgment).

Angelo W. Locascio, Clerk

DECISION OF BOARD OF IMMIGRATION APPEALS

U.S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

File: A11 239 287 – Newark MAY 16 1969

In re: RENATO *RIVA*

IN EXCLUSION PROCEEDINGS

APPEAL

ORAL ARGUMENT: February 20, 1969

On behalf of applicant:
Elmer Fried, Esquire
515 Madison Avenue
New York, New York 10005

On behalf of I&N Service:
Irving A. Appleman, Esq.
Appellate Trial Attorney

EXCLUDABLE:

Sec. 212(a)(20), I&N Act (8 U.S.C. 1182(a)(20)) – Immigrant – not in possession of a valid immigrant visa

Sec. 212(a)(22), I&N Act (8 U.S.C. 1182(a)(22)) – Departed to avoid military service

APPLICATION:

Admission as a student; waiver of inadmissibility (section 212(a)(22) of the Act) pursuant to section 212(d)(3) of the Act (8 U.S.C. 1182(d)(3))

Applicant appeals from the special inquiry officer's order finding him inadmissible under section 212(a)(22) of the Act. His admission to February 15, 1969 was authorized by the special inquiry officer who waived the ground of inadmissibility under Section 212(d)(3) of the Act. The issue is whether the applicant has established that his departure from the United States on August 7, 1966 was not to avoid military service. We hold he has failed to carry his burden. We shall dismiss the appeal.

The applicant, a 27-year-old married male, a native and national of Peru, has made several entries. This is his testimony: He was first admitted in August 1965. He came to marry and to take his wife to Peru, where he was employed in his father's business. He sought employment because his wife, a United States citizen, desired to delay the move for "a couple of years" (p. 14). Finding he could not work unless he was a permanent resident, he became one in November 1965 although he had no intention of remaining permanently (pp. 14-16, 19). He worked and he also went to school. He registered for the draft in December, 1965. Classified 1-A in February 1966, he tried, without success, to have his immigration status changed to that of a draft-exempt nonimmigrant on the ground that he intended remaining in the United States not more than two years because he was committed to return to his father's business. Notified to report for induction on August 19, 1966, he again told the draft board that he had no intention of remaining and that he desired to be relieved from liability to service by changing his immigration status or taking any other steps that might be available. He found he could not be relieved. He determined he would go abroad, relinquish his status as a permanent resident, and return in a nonimmigrant status which would place him in a position to gain draft exemption (pp. 15-19, 36; Exs. 2, 3).1 On

August 7, 1966, he left for Peru. After consulting with the American vice consul (pp. 19-20), he sent the Service his alien registration card with the information that he was relinquishing his immigration status, and that he had never intended becoming a citizen, and that he had intended residing only temporarily in the United States (pp. 19-20; Ex. 4). He departed not to evade service, but to give up his status as a permanent resident – an act he could not do while in the United States – and return as a nonimmigrant so that he could apply for draft exemption (pp. 33-34).

He returned to the United States on August 30, 1966. He was admitted as a visitor on presentation of the tourist visa on which he had entered in 1965. It was still valid. He continued living with his wife at his old address and went back to school. He had no intention of avoiding the jurisdiction of the draft board. Admitted for three months, he was denied any extension of stay beyond February 1967.

Applicant's testimony continues: In January 1967, he returned to Peru, obtained a visa as the representative of a foreign information media, and gained admittance to the United States in this status on February 11, 1967.[2] He wrote articles for a Peruvian paper and he also attended school. When the paper failed to pay him for his articles, he stopped writing for it. He did not apply for an extension of stay. He was placed under deportation proceedings and given voluntary departure. In the meantime, he had applied for an immigrant visa, for he had decided to live in the United States permanently. Although he supplied the facts concerning his draft problem to the consul in

[2]Such a nonimmigrant was not required to register for the draft while maintaining status, 32 C.F.R. 1611.2(b)(10).

Peru (Ex. 5), he received notice from him, on April 20, 1968, that his papers were in order and that he was to appear for interview on May 2, 1968. He arrived in Peru about April 26. Before his arrival, the Service informed the consul that they considered him inadmissible as one who had departed to avoid military service. When he appeared before the consul, he was told the problem raised by the Service had to be investigated, that the Selective Service filed had been sent for, and that it would take about six weeks to get it. He told the consul that he had to return to the United States to take his school's final exams in two weeks. The consul gave him a student visa and told him to attempt to reenter with it (p. 28).

The record reveals that on his arrival in Miami, the applicant was detained because he did not appear to be clearly admissible, and he was given a hearing in exclusion proceedings. In the exclusion proceeding, he sought admission only as a student until he could graduate in January 1969. He told of his desire to someday be a permanent resident, of his awareness that he had to depart to obtain a visa to become one, and of his resolve not to violate his student status while in the United States. The special inquiry officer entered the order from which this appeal is taken.

Counsel contends that applicant is not excludable as a draft evader because he left the United States not to escape service, but to obtain a draft-exempt status. Counsel points to students and divines who, although draft deferred or exempt, are not considered as evading the draft. The contention avoids the issue. We are concerned not with the manner in which the applicant returned to the United States, but with the circumstances under which he left. We look to the primary purpose for the departure, *Matter of Nunez-Toro*, 11 I&N Dec. 501 (BIA 1966).

Applicant had been ordered to report for induction – he left the country to avoid the order: avoidance of induction was the primary purpose of his departure. That he planned to come back draft-free is quite beside the point. His status became fixed at the moment of his departure for purposes of section 212(a)(22), *Martinez v. Pilliod*, No. 59 C 2053 (N.D. Ill. April 21, 1961), history in *Petition for Naturalization of Martinez*, 202 F. Supp. 153, 155 (N.D. Ill. 1962). See *Alarcon-Baylon v. Brownell*, 250 F.2d 45 (5 Cir. 1957). The situation is not without analogy to that which exists when certain aliens became ineligible for citizenship because they sought relief from liability to military service – their status became fixed when they chose to free themselves from liability to service, *Ceballos v. Shaughnessy*, 352 U.S. 599 (1957).

Counsel believes that it is wrong to exclude the applicant as a draft evader because he did no more than others have done with the approval of both the Immigration Service and the Selective Service Board. These agencies permit certain doctors who were admitted to the United States as immigrants to depart and apply at an American consulate for an exchange visitor's visa – a status in which they would no longer be subject to the draft. These doctors were admitted as immigrants for training. They entered the United States solely with the intention of residing here temporarily. When they were admitted they were too old for service. They became subject to the draft when the age limit was raised. Without attempting to pass on the status of the doctors who took advantage of the procedure outlined by counsel, we point out that a departure with the approval of the Selective Service Board is not a departure in the face of the order of the Board to report for induction. It is the latter situation that is before us.

Counsel contends that section 212(a)(22) of the Act was intended to reach the person who departed from the United States to escape service *and* who removed himself from the jurisdiction of the United States. He points out that the applicant has not removed himself from the jurisdiction of the United States, for although he departed from the United States, he did so to reenter in an exempt status and place himself within the jurisdiction of the United States. He bases his contention on his reading of the legislative history of section 212(a)(22) of the Act and of section 349(a)(10) of the Act (8 U.S.C. 1481(a)(10)). The latter section provides for the expatriation of one who departed from the jurisdiction of the United States to escape service. The Service representative contends that if the applicant is not found excludable under section 212(a)(22), he will have accomplished exactly what Congress hoped to prevent – an alien escaping his draft obligations by departing from the United States, but returning to the United States for permanent residence after he is no longer liable for service.

Counsel's contention must be rejected. Counsel would have the section provide that a person who departed to evade service was to be readmitted if he applied for admission while the emergency that originally called for his service was still in existence, and if he departed with the intention of returning as soon as he had accomplished his evasion of service. This is not the law that Congress passed. The language is clear. It shows no concern with obtaining jurisdiction over an alien who departed: its concern is to prevent the return of the departed alien. We note the law does permit the return of nonimmigrant aliens who were nonimmigrants when they left to evade service, but all other aliens who departed to evade service are *barred* from entry. Moreover, we have already pointed out that the alien's

status became fixed at the time of the departure.

Counsel's interpretation could make it possible for individuals to evade service by departing, remaining out until they became ineligible for service because of their age or other reason, and then returning without hinderance while the emergency that required them to serve still existed. We find nothing in the legislative history or example cited by counsel that would justify the conclusion that Congress intended to approve of such conduct.

The special inquiry officer authorized the applicant's admission to the United States temporarily so that he could obtain his degree and conclude his affairs. This was proper.

ORDER: The appeal is dismissed.

s/ Maurice A. Roberts
Chairman

DECISION OF SPECIAL INQUIRY OFFICER

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A11 239 287 – Newark, New Jersey January 7, 1969

In the Matter of
RENATO RIVA
Applicant IN EXCLUSION PROCEEDINGS

EXCLUDABLE:

I & N Act – Section 212(a)(20) (8 U.S.C. 1182(a)(20)) – Immigrant – not in possession of valid immigrant visa. I & N Act – Section 212(a)(22) (8 U.S.C. 1182(a)(22)) – Departed to evade military service.

APPLICATION:

Admission as a student; Waiver of inadmissibility under Section 212(a)(22), pursuant to Section 212(d)(3)

IN BEHALF OF THE APPLICANT:

Elmer Fried, Esquire
515 Madison Avenue
New York, New York 10005

IN BEHALF OF THE RESPONDENT:

John Ruggiero
Trial Attorney
New York, New York

DECISION OF THE SPECIAL INQUIRY OFFICER

The applicant in this cause is a 27 year old, married, male, alien, a native and citizen of Peru. He seeks admission to the United States as a nonimmigrant student in order to attend Monmouth College in West Long Branch, New Jersey, where he is pursuing a course of study leading toward a bachelor's degree in Business Administration. He hopes to complete his studies by January 1969. He is in possession of a Certificate of Eligibility, Form I-20-A, issued to him by the Recorder of Monmouth College, attesting to his being a student at that institution and a valid Peruvian passport. He does not now have an immigrant visa but the passport contains a valid student visa (F-1) issued to the applicant by the American Consul, Lima, Peru.

The Service objects to the applicant's admission to the United States contending that he is an immigrant who does not have the required immigrant visa and as such is inadmissible within the provisions of Section 212(a)(20) of the Immigration and Nationality Act, (8 U.S.C. 1182(a)(2). As the cause proceeded it became apparent that the Service was also impliedly contending that the applicant was further inadmissible to the United States within the provisions of Section 212(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(22), in that he has previously departed from the United States to evade or avoid military service in the armed forces of the United States. Counsel for the applicant urged that, if such was the Service's contention, a formal charge to that effect should be lodged against the applicant. I then held, and now adhere to that ruling, that the formal lodging of a charge was not required in an exclusion, as differentiated from an expulsion, proceeding.

I turn to the facts in the cause. The applicant previously came to the United States as a nonimmigrant visitor. While here he met a native born United States citizen. He later left and then returned and married this United States citizen in August 1965. He thereafter applied for, and on November 29, 1965 obtained, the status of a permanent resident of the United States. It is his contention that at the time he came to the United States in August, 1965, he did not intend to remain here permanently, but rather intended to return to Peru, pursuant to a business commitment that he had with his father. He subsequently changed his mind, decided to stay, at least temporarily, and applied for and obtained permanent residence, as aforesaid. It is his contention that this acquisition of permanent residence was made, at least in part, upon the request of his then employer, Mobil Oil Corporation.

On December 10, 1965 after obtaining permanent residence status, the applicant registered with the appropriate local board of the Selective Service System in Toms River, New Jersey. In February 1966 he was classified 1-A and ordered to report for a physical examination on March 14, 1966. On March 7, 1966 he wrote to the Immigration and Naturalization Service at Newark, New Jersey, and advised that he desired to relinquish his permanent residence and obtain permission to reside temporarily in the United States until June 1966. He explained in his letter (EXHIBIT 2) that he wanted to return to Peru because of personal, family and occupational reasons and that at the time he applied for and obtained permanent residence (September and November 1965) he "had no idea of the consecuenses (sic) and obligations of a resident, and was not a bit pre-occupied with the selective service....'. He was informed by the Immigration authorities that there was no provisions in law under whereby he could relinquish his permanent residence and be

restored to visitor status.

On July 22, 1966 he was ordered to report for induction into the armed forces of the United States on August 19, 1966. On July 25, 1966 he visited the local Draft Board and informed the clerk there that he did not intend to become a citizen of the United States and did not intend to remain permanently in the United States. He requested permission to depart in order to return to Peru. He allegedly had several conferences on the same day with both local and state Selective Service officials in connection with his desire to file an application for relief from the military service. He was finally informed by the state and local officials that as a resident of the United States he was not eligible to obtain such relief; that its availability was limited to non-residents. He was further informed, he alleges, that he could not relinquish his permanent residence in the United States. This is concedely the same information which the Immigration authorities gave him in April 1966, in response to his letter of March 7, 1966. The applicant then left the United States on August 7, 1966 and the following day appeared at the office of the American Consul in Lima, Peru. He conferred with a Vice Consul and at the suggestion of that Vice Consul wrote a letter to the Immigration authorities advising that he was surrendering his residence status. He returned his Form I-151, Alien Registration Receipt Card, with this letter. He contends that he was informed by the Vice Consul at that time that he could return to the United States as a nonimmigrant and he, therefore, did return utilizing a B-2 visitor's visa which he had obtained in 1963.

Upon his return to the United States on August 30, 1966, he went to the same address from which he had departed on August 7, 1966. He returned to his wife. He registered for

school and he attended classes for one semester. He applied for an extension of stay as a visitor, which application was denied by the Immigration authorities at Newark, New Jersey, in January 1967. He left the United States that same month and returned the following month, February 1967, utilizing an "I" visa which he obtained in Lima, Peru, as an alleged employee of an information media. Upon his return he continued to attend the same school, Ocean County Junior College. He later changed schools to Monmouth College, where he is now enrolled. He wrote several articles for a Peruvian Newspaper, but concedes he was never paid for the articles and that his authority or relationship as a correspondent ultimately ended. During this period, early in 1967, the applicant, also, with the assistance of his counsel, was attempting to apply for and obtain an immigrant visa through the office of the American Consul in Lima, Peru. In April 1968 he received an invitation from the said American Consul to appear on May 2, 1968 and apply for a visa. At this time he was under deportation proceedings. He obtained, as the result of a hearing in deportation proceedings, permission to depart voluntarily, in lieu of deportation, and he left and returned to Peru.

In an interview with the American Consul in Peru, he allegedly learned for the first time that there were substantial complications in his obtaining an immigrant visa. The Consul informed him that there was a legal issue of his eligibility for such a visa and his admissibility to the United States in the light of his apparent departure from the United States to avoid military service. The applicant states that he denied the contention advanced by the Consul but gathered the impression that there would be considerable delay in connection with the determination in his case and there was a possibility that the visa would be denied. Further, he was desirous of promptly

returning to the United States in order that he might sit for his examinations at Monmouth College, scheduled in May 1968. For these reasons he applied for and obtained from the Consul a student, "F", visa and with this visa and the Form I-20-A from the Monmouth College he sought to return to the United States as a student. It was on this occasion that the primary Immigrant Inspector at Miami, Florida, entertained doubts as to the applicant's admissibility to the United States, when he sought admission on May 11, 1968. The applicant was, therefore, and admitted to the United States and subsequently on May 31, 1968 served with a notice, which brought his case before me.

At this time the applicant seeks admission only as a student. He states that while he may well want to ultimately remain permanently in the United States, he has every intention and expectation to depart from the United States at the conclusion of his studies and then apply for an immigrant visa outside of the United States. He is aware, upon the advice of his able counsel, that as a native of an independent Western Hemisphere Country, he cannot adjust his status to that of a permanent resident in the United States. I find the applicant's testimony in this regard to have been given forthrightly and with candor. I accept it as credible. Though his wife is here in the United States with him, he does have a home in Peru to which he can and to which he states he does intend to return. I find him to be a bonafide nonimmigrant student – not an immigrant – and he is thus not inadmissible to the United States under Section 212(a)(20) of the Immigration and Nationality Act.

There is to me only one legal issue in this case. Is the applicant a person who is inadmissible to the United States within the provisions of Section 212(a)(22) of the Immigration and Nationality Act, as one who departed to evade or avoid

military service in the armed forces of the United States. If he is such, than as a corolary thereto, is he eligible and worthy for the discretionary exercise of my authority so as to permit him to enter temporarily to pursue his studies, notwithstanding this ground of inadmissibility. Let me quickly answer the latter question. I hold that he is.

The primary question is much more substantial. Learned Counsel for the applicant, in oral argument and in a brief which he has submitted in support thereof, contends, as the result of his study of the legislative history in connection with the enactment of Section 212(a)(22) of the Immigration and Nationality Act, that the intention and purport of the enacting legislation was to limit its applicability to those persons who fled or absented themselves from the United States to avoid military service as differential from a person, such as the applicant, who openly and avowedly left the United States, after making his intention well known to the Immigration and Selective Service authorities. I am impressed, but not convinced, by the ingenuity of Counsel's contention. It is my considered opinion that the Section under questioning is clear and unambiguous in its intent to encompass, and I hold it does encompass, every alien who was not a non-immigrant, i.e., was a immigrant, who departed from or remained outside of the United States to avoid or evade training or service in the armed forces of the United States. The statute additionally requires that the act be performed in the time of war or a period declared by the President to be a national emergency. Such a declaration was made by former President Truman and still remains in force and effect.

The evidence adduced during the course of the proceeding permits only one finding and conclusion. Reduced to its

simplest terms as the applicant has clearly, unequivocally and honestly testified, the applicant requested a change of status from immigrant to nonimmigrant, after he received notice from the Selective Service local board to report for a physical examination. He did so because he believed that nonimmigrants (as distinguish from immigrants) were not liable for military service under the Selective Service System. He left the United States, to obtain that nonimmigrant status, when he was informed that he could not obtain such status in the United States, in order that he would not be liable for the military service. Counsel, in effect, claims that the applicant left the United States to obtain nonimmigrant status and for no other purpose. I cannot close my eyes and ignore, as counsel would apparently have me do, the motivating cause for the applicant's desiring to obtaining nonimmigrant status; the motivating factor for his leaving the United States. It is essentially a cause and effect relationship. The "cause" was the applicant's desire to avoid military service, the tool was the obtaining of nonimmigrant status, the only way the applicant could avoid military service; the "effect" is that he become a person inadmissible to the United States.

Finding, as I do, that the applicant is inadmissible to the United States as an alien who departed from the United States to evade military service in the armed forces of the United States, I reiterate, as I indicated above, that I will exercise my authority to admit the applicant as a student, notwithstanding this ground of inadmissibility. I exercise this authority pursuant to the provisions of Section 212(d)(3) of the Immigration and Nationality Act, to permit the applicant to complete his studies and obtain his degree. He has informed me that he will complete his studies in January of 1969. I will thus authorize his temporary admission, pursuant to the aforesaid waiver, to

February 15, 1969, to permit him to conclude his affairs and depart from the United States.

The foregoing shall constitute my findings of fact and conclusions of law in this cause.

I enter herewith the following order:

ORDER: IT IS ORDERED that the applicant be admitted to the United States as a nonimmigrant student, to February 15, 1969, pursuant to the discretion contained in Section 212(d)(3) of the Immigration and Nationality Act, notwithstanding his inadmissibility to the United States under Section 212(a)(22) of the Act, as an alien who has departed from the United States to avoid or evade training in the armed forces of the United States during a period declared by the President to be a national emergency.

s/ William B. Taffet

WILLIAM B. TAFFET
Special Inquiry Officer